IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 17, 2004

STATE OF TENNESSEE v. WILLIAM GEORGE SOLLER

Appeal from the Circuit Court for Sevier County
No. 8040 & 8659 Richard R. Vance, Judge

No. E2003-02970-CCA-R3-CD - Filed October 19, 2004

The Appellant, William G. Soller, appeals the denial of his petition for judicial diversion. Under the terms of a plea agreement, Soller pled guilty to aggravated burglary, aggravated assault, and resisting arrest and received an effective sentence of six years, with service of thirty days in the county jail. Following imposition of the agreed sentence, Soller moved for judicial diversion. At the scheduled hearing, the trial court ruled that Soller was statutorily ineligible, as he had previously been granted diversion in the state of Florida. This ruling is in conflict with our supreme court's holding in *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999). Irrespective of the error, we conclude that the trial court was without authority to alter the terms of a negotiated plea agreement which was dispositive of all sentencing issues. *See* Tenn. R. Crim. P. 11(e)(1)(C). Nonetheless, because the sentences imposed embody the plea agreement of the parties, Soller's sentences are affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ALAN E. GLENN, JJ., joined.

Richard L. Burnette, Knoxville, Tennessee; and Bryan E. Delius, Sevierville, Tennessee, for the Appellant, William George Soller.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Brent C. Cherry, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and Joseph A. Baker, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On April 2, 2003, the Appellant, in accordance with the terms of a negotiated plea agreement, pled guilty to aggravated burglary, aggravated assault, and resisting arrest. A second aggravated

assault charge was dismissed. As provided by the plea agreement, the Appellant received concurrent six-year sentences for his aggravated burglary and aggravated assault convictions, both being class C felonies. For his conviction for resisting arrest, the Appellant received a concurrent sentence of six months. The agreement further provided that the Appellant would be required to serve thirty days confinement, followed by "Community Corrections Probation" for the balance of the sentences.[1]

Following entry of the guilty pleas, the Appellant's counsel advised the trial court that the Appellant would be seeking judicial diversion. The court agreed to consider the Appellant's entitlement to diversion but reserved its ruling on the request pending a written petition. The Appellant subsequently filed a petition for diversion on April 8, 2003. A ruling was never reached on the petition, and the judgments of conviction were entered on April 30, 2003. The Appellant then filed a Motion for Correction of Judgments, asserting that his petition for diversion had not been adjudicated.

A hearing was held on October 14, 2003, during which the Appellant introduced numerous letters supporting his request for diversion, as well as several certificates evidencing the Appellant's prior military service and training. A certificate of eligibility for diversion from the Tennessee Bureau of Investigation was also introduced. After reviewing the evidence, the trial court denied the Appellant's request for diversion, finding that he was statutorily ineligible because of a prior diversion in another state. The Appellant appeals.

Analysis

The Appellant argues that the trial court erred in ruling that he was statutorily ineligible for judicial diversion due to a prior adjudication of diversion in the state of Florida in 1992. It is true that our diversion statute, Tennessee Code Annotated section 40-35-313 (2003), provides that "[d]ischarge and dismissal under this section . . . may occur only once with respect to any person." In denying diversion, the trial court observed:

> [I]t is important that the law states clearly that it can only be used once. And it appears to this Court, and I so find that it has been already used up in that judgment from the State of Florida. So he's simply not eligible under this provision. Notwithstanding the good record and all those other things which are very important.

[1] The record at the guilty plea hearing clearly establishes that the trial court imposed two concurrent six-year sentences to community corrections. However, the judgment forms reflect that the Appellant was sentenced to the "TDOC." Because a sentence to community corrections and a sentence to the Department of Correction are two distinct sentences with different program requirements, different conditions, and distinctly different consequences following revocation, it is important that the correct sentence be noted on the judgment form. Any conditions, such as a period of incarceration, should be noted in the "special conditions" section of the judgment form.

The State concedes that this ruling was erroneous. In *Schindler*, 986 S.W.2d 209, in a virtually identical issue, our supreme court concluded that a defendant who had twice been granted diversion in two different states was not statutorily ineligible for diversion in Tennessee. The court reasoned:

> Our legislature has explicitly stated that a defendant may be placed on judicial diversion only once under Tenn. Code Ann. § 40-35-313. The defendant's prior grants of diversion in Kansas and Texas, however, were not pursuant to Tenn. Code Ann. § 40-35-313. Accordingly, the defendant is not statutorily precluded from being placed on diversion by § 40-35-313(a)(2) merely by reason of the prior grants.

Id. at 212.

Accordingly, we find that the trial court's ruling was in error. Notwithstanding error, we are compelled to address the overriding issue of whether the trial court had the authority to alter the terms of the plea agreement and grant the Appellant diversion.

The assistant district attorney opposed any consideration of diversion both at the guilty plea hearing and again at the diversion hearing. Following the Appellant's admissions of guilt to the offenses at the guilty plea hearing, and before the court's imposition of sentences, Appellant's counsel advised the trial court that it would be requesting judicial diversion. The trial court responded: "I will allow you to file a written petition and have the TBI run their background check, and in the event, I've got jurisdiction over the case for the next six years." The following colloquy then occurred:

> GEN. BAKER: Our agreement, certainly Mr. Delius has been here many times before and if he ever wants a deferral he certainly talks to me about that prior to an agreement, that is not part of the agreement.
>
> THE COURT: I understand. And . . .
>
> MR. DELIUS: I thought I stated that, Your Honor. It was not part of the agreement.
>
> THE COURT: You did. It's not part of the agreement.
>
> MR. DELIUS: This is within the purview of the Court to decide though, not within the purview of the District Attorney's office.
>
> THE COURT: Anything further I need to know?
>
> MR. DELIUS: No, Your Honor.

At this point, the trial court accepted the Appellant's pleas of guilty and entered judgments of convictions and sentences in each case in accordance with the plea agreement.[2]

Again, at the diversion hearing, the assistant district attorney advised the court:

> GENERAL BAKER: Your Honor, back in April we entered into a full agreement. The agreement was that [the Appellant] would plead guilty to these offenses, the aggravated assault and aggravated burglary. And at that time he got a relatively small amount of jail time for the nature of these offenses. That was the full agreement of the State and the defense and there was no mention of any kind of deferral or the eligibility of diversion. Had there been, Your Honor, we wouldn't have entered into that agreement. We would have pushed forward and avoided this, altogether. . . . The State would be opposed to a deferral.

Defense counsel responded:

> MR. DELIUS: I did not have an agreement, Your Honor, and we announced that at the time when we entered the plea, that we did not have an agreement as to the issue of judicial diversion. And the Court made the State aware that that was your decision, not the State's decision, as to whether or not to grant that at that time. It was not an agreed-upon thing, and I made the Court aware of that at the time. And the Court indicated at that time that it was going to reserve the issue of judicial diversion and ask us to present things on his behalf, which we came to court to do.
>
> And I was quite surprised, Your Honor, that the judgments went down without any reference to the Court's ruling that it was holding that issue in reserve.

It is abundantly clear from the record in this case that the Appellant entered his guilty pleas pursuant to Tennessee Rules of Criminal Procedure 11(e)(1)(C), as the State and the Appellant agreed to the specific sentences to be imposed in each case. Nothing was reserved in the plea agreement for the court to decide, as the agreement was dispositive of all sentencing issues. The negotiated plea agreement in this case secured dismissal of a felony offense and significantly reduced the Appellant's exposure to extended incarceration. The plea agreement procedures of Rule 11(e) do not contemplate that the Appellant may bind the State to its agreement while at the same time permit the Appellant to seek additional sentencing benefits from the trial judge. In *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998), this court observed that:

> Our supreme court has held that "[t]here is no provision in Rule 11(e) [Tenn. R. Crim. P.] that permits the trial court to alter the agreement if the plea is being entered

[2]The statute is clear that when the trial court is considering a defendant for diversion, following a guilty plea, the judgment of conviction should not be entered. Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003).

under subsection (1)(C)." *State v. Grady Hargrove*, No. 01S01-9203-CC-00035, 1993 WL 300759, slip op. at 3, Humphreys County (Tenn., Nashville, Aug. 9, 1993).

Accordingly, we conclude that the trial court was without authority to alter the terms of the plea agreement. However, because the trial court did not grant the Appellant' request for diversion in this case, the terms of the plea agreement were not altered. Thus, the Appellant's assigned error is irrelevant as the sentences were entered in conformity with the plea agreement. Accordingly, the sentences are affirmed.

CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the sentences imposed by the trial court, but we remand the case for entry of corrected judgments consistent with footnote 1 of this opinion.

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DAVID G. HAYES, JUDGE